

1 UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF NEW YORK
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 6 UNITED STATES OF AMERICA) 14CR89A
 7 vs.)
 8 STACY SAMUELS,) Buffalo, New York
 9 Defendant.) September 26, 2014
 10 - - - - - X 10:00 a.m.

11 **MOTION**

12 **Transcribed from an Electronic Recording Device**

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 14 TRANSCRIPT OF PROCEEDINGS
 15 BEFORE THE HONORABLE JEREMIAH J. MCCARTHY
 16 UNITED STATES MAGISTRATE JUDGE
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2 P R O C E E D I N G S

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6 THE CLERK: On the record, this is the matter the
7 United States versus Stacy Samuels, case No. 14CR89. For the
8 government, Edward White; for the defendant, Jeremy Schwartz.
9 The defendant is present. We're here for oral argument before
10 the Honorable Jeremiah J. Mccarthy.

11 THE COURT: Good morning, Ms. Samuels. Good
12 morning, counsel.

13 MR. WHITE: Good morning.

14 MS. SCHWARTZ: Good morning, Judge.

15 MAGISTRATE JUDGE MCCARTHY: I've reviewed the
16 submissions. And I'll hear, counsel, Mr. Schwartz, in light of
17 the government's response, are there some aspects of your
18 motion that are moot?

19 MS. SCHWARTZ: Judge, the government has provided
20 discovery and those related motions, I think, are satisfied.
21 The one item of contention that I have not received, I
22 understand that the government does not have in their
23 possession, would be the supporting affidavits, or whatever it
24 is that is used to support the issuance of a search warrant for
25 the Canadian Magistrate. And that is going to be the bulk of

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2 what I want to argue. I did move for suppression of the
3 eavesdropping evidence because it was recorded based on a
4 Canadian Magistrate's order. And I know there is a lot of case
5 law -- well, there is some case law, and I know this Court's
6 seen some of these cases come through and made some decisions
7 or recommendations with respect to that. I think this one is a
8 little different. First of all, well, the main difference
9 being, and the government stated in its response, that there is
10 no evidence that there was recording going on in the United
11 States, but that is just not true. In the discovery, the
12 government sent some intercepted SMS messages, text messages,
13 and these are messages allegedly between Ms. Samuels and the
14 co-defendant, Karone Johnson, regarding what they're doing
15 while they're in the United States. So, there is the Canadian
16 authorities recording individuals on U.S. soil, which, I think,
17 does make a difference here. This isn't something that
18 happened at the border where the Fourth Amendment essentially
19 doesn't apply or in Canada where the Fourth Amendment
20 essentially doesn't apply. These are conversations going on
21 while she is in the United States and the Fourth Amendment
22 does, of course, apply to her here.

23 MAGISTRATE JUDGE MCCARTHY: But the Fourth
24 Amendment applies to actions by the government.

25 MS. SCHWARTZ: Well, that's -- yes. And if the

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2 Canadians -- we probably need a hearing on this is what I'm
3 getting at, Judge. If the Canadian authorities were working in
4 conjunction closely with the U.S. authorities on this, which
5 all of the evidence, it looks that way from what happened,
6 because Karone Johnson -- these recordings were going on.
7 Karone Johnson is arrested before he leaves the United States
8 by U.S. authorities and charged in the U.S., so it sounds like
9 the U.S. was using -- availing itself of Canada's monitoring,
10 which was not done by -- which, of course, was done by a
11 Canadian order. So, the U.S. authorities are using that to
12 monitor people and arrest them before they leave the United
13 States and charge them with U.S. crimes. So, this isn't just
14 they arrested somebody in the United States and they are
15 getting the benefit of what Canada had from the past. This is
16 something that happened in realtime. And I think we need a
17 hearing as to the extent to which they're involved. Or the
18 government should at least be ordered to attempt to get the
19 affidavit from the RCMP.

20 MAGISTRATE JUDGE MCCARTHY: Why shouldn't you get
21 it? The case they cited, the *Lee, United States vs. Lee*, in
22 that case the Court said the defendant could have obtained it
23 by letters or something of that sort and made no effort to do
24 so.

25 MS. SCHWARTZ: Well, I tried to that process. I

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2 had some discussion with a lawyer in Canada, and they tell me
3 that the RCMP, that it's very difficult to do that. And this
4 lawyer in Canada has made attempts to do that, actually, and
5 has met with a wall. So, I have not been able to get it. I
6 can and will continue to attempt to do that. But it's not
7 something that -- I don't know why the case law seems to
8 suggest that it's such an easy matter to do when Canadian
9 lawyers can't even do it.

10 MAGISTRATE JUDGE MCCARTHY: Mr. White, what is
11 your position on the hearing?

12 MR. WHITE: Well, I don't think --

13 MAGISTRATE JUDGE MCCARTHY: Well, first of all, on
14 getting a copy of the application.

15 MR. WHITE: Well, as Mr. Schwartz just indicated,
16 it's difficult to do. It's my understanding they would fight
17 it and I don't know -- I think the supposition is it's easier
18 for the U.S. government to get it than it is for a defense
19 attorney. That's not true. It's difficult for anyone in the
20 United States to get it. And I think it is difficult for
21 anyone in Canada to get a copy of the underlying application
22 and affidavit for these eavesdropping warrants. And as
23 indicated, as you pointed out, Judge, in that decision in *Lee*,
24 it's just as easy, the burden shouldn't necessarily fall on the
25 government to try and track this down and go through every

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potential legal hoop to potentially try and get this application/affidavit. It's just as easy for the defense to try and get it. And it is difficult -- it's difficult for the United States government as well. And it's my understanding, Judge, that they would fight it, they don't just voluntarily turn it over. So, that is one issue. And as indicated in the *Lee* case, the Court denied the defendant's motion to compel the production -- the motion to compel the United States Government to produce that underlying affidavit. And as the Court, I think, is well aware, the general rule in this case is that the Fourth Amendment and Title 3 doesn't apply to foreign governments and to foreign wiretaps. And there are generally two exceptions to that rule, however, and that is when there is evidence that the foreign officials engaged in conduct that would shock the conscience, the judicial conscience. And here there is no such evidence of any illegal sinister conduct by the Canadian authorities in obtaining the eavesdropping warrant. The government has produced the only evidence or document that it has in its possession regarding the eavesdropping warrant is the warrant itself. The warrant itself, while it doesn't contain the underlying -- the supporting affidavit, it does indicate the process that was gone through, and clearly it's similar to the process in the United States where a law enforcement officer submits a sworn

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1 affidavit and it works in conjunction with a Canadian lawyer, a
2 prosecutor there, and they submit it to a magistrate. The
3 magistrate reviews and then determines whether there is
4 probable cause to issue the warrant. And that is what happened
5 here. So, there is no evidence whatsoever of any sort of
6 conduct that might shock the judicial conscience here. And,
7 secondly, the other exception to the general rule is when the
8 Canadians or any foreign agent just becomes a virtual agent of
9 the United States. Where it's basically the United States
10 somehow captures foreign agents and uses them at their
11 discretion to avoid restrictions of the Fourth Amendment, and
12 clearly here that is not the case. As well as indicated in our
13 papers, Judge, the Canadian -- this is an independent
14 investigation by the Canadians. They filed the request for the
15 wiretap warrant back in January, January 30th of 2014. The
16 United States didn't know anything about this investigation
17 until March 20th, 2014 when the Canadians realized that there
18 was potential for the defendant and others in the conspiracy to
19 that they may cross the border to try and obtain this
20 methamphetamine. And that is when the border enforcement task
21 force, the joint task force, got together, and the Canadians
22 requested the assistance, the potential assistance of the
23 Americans to help them conduct surveillance if these targets
24 cross the borders, which they ended up doing. So, it's clearly
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2 this wasn't a case where the United States was directing this
3 investigation and that they merely used foreign officials to
4 try and subvert the Fourth Amendment. And, Judge, I think, I'm
5 sorry, specifically on the issue of a hearing, as indicated in
6 footnote 1 of our brief, I don't think there is a need for a
7 hearing. The defense has to come up with some sort of basis,
8 some allegation that there is -- and not just a pure
9 speculative allegation that something nefarious occurred here.
10 There has to be some sort of proof of that or at least some
11 evidence of it. There isn't here. There is pure speculation
12 that something sinister happened and there is no evidence of
13 that whatsoever. So, I don't think a warrant is warranted.

14 MS. SCHWARTZ: Of course that is part of the
15 problem with not having an affidavit because I have to have --
16 we have no evidence of what they did at all to get the wiretap.
17 We have no evidence, period. So, in order to come up with
18 evidence -- I have no idea -- I have no idea how they got the
19 wiretap warrant. And the fact that there is a standard at all,
20 even it's pretty much the highest standard in our system, to
21 shock the judicial conscience matter, but the fact that there
22 is a standard at all, implies there is a right to review. And
23 without the affidavit, you can't review. So, and the
24 government is saying even the government can't get it. So, I
25 don't think they should be able to use it if the Court was

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2 unable to review it at all, whatsoever. And, also, I don't
3 agree that it's just obvious that the U.S. had no involvement
4 in this. That is why we have hearings.

5 MR. WHITE: If I may, Judge.

6 MAGISTRATE JUDGE MCCARTHY: Well, counsel, I'm
7 leaning toward not ordering a hearing, but I want to take
8 another look at this and the case law. And I will get a
9 written decision out or recommendation out and we'll see where
10 we go. As far as an obligation or opportunity to obtain the
11 underlying application, it seems to me that both parties are
12 pretty much in the same boat with respect to that. And it's
13 the defense motion. But, again, I want to take another look at
14 this, and I'll get a Report and Recommendation out. And if I
15 decide that we will have a hearing, we can reconvene to
16 schedule it. And if I decide that a hearing is not necessary
17 at this time, then you can take that upstairs, okay?

18 MS. SCHWARTZ: Understood.

19 MAGISTRATE JUDGE MCCARTHY: Okay. And with the
20 exception of that issue, I'll deem the remainder of the motion
21 moot as satisfied by the government's response.

22 MS. SCHWARTZ: Yes, Judge.

23 MR. WHITE: Thank you.

24 MAGISTRATE JUDGE MCCARTHY: Thank you. The
25 defendant's remanded.

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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript from
the official electronic sound recording of the proceedings in
the above-entitled matter.

/s Karen J. Bush, RPR

Official Court Reporter